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IN THE
COURT OF APPEALS OF INDIANA

JUSTIN SILVERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0704-CR-188
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0607-FB-133

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Justin W. Silvers appeals the twenty-one-year aggregate sentence imposed following his convictions for Operating a Vehicle while Intoxicated Causing Death,[1] a class B felony, and Failure to Stop after Accident Resulting in Injury or Death,[2] a class A misdemeanor. Specifically, Silvers argues that the trial court was without authority to impose a twenty-year sentence on the operating charge and that it erroneously imposed both enhanced and consecutive sentences. Moreover, Silvers argues that the sentences were inappropriate in light of his character and the nature of the offenses. Finding no error, we affirm the judgment of the trial court.

FACTS

On June 11, 2006, Silvers was intoxicated and drove through a stop sign at an intersection in Allen County. Silvers crashed into another vehicle that was driven by forty-seven-year-old Cynthia Scherer, who died in the accident. Silvers fled the scene without checking on Scherer's condition or contacting police.

As a result of the incident, the State charged Silvers with six offenses. On December 15, 2006, Silvers and the State reached an agreement whereby Silvers would plead guilty to the above offenses[3] in exchange for the State's dismissal of the remaining counts. The agreement also provided that whatever sentences the trial court imposed were to run consecutively to each other and to the remaining probation time that Silvers had received in

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[1] Ind. Code § 9-30-5-5(a)(3).

[2] Ind. Code §§ 9-26-1-1, -8.

[3] The State originally charged the failure to leave the scene as a class C felony.

another case. Silvers acknowledged at the guilty plea hearing that he was subject to a sentence ranging from six to twenty years for a class B felony.

At the sentencing hearing on December 15 2006, the trial court determined that Silvers's decision to plead guilty was a mitigating factor. However, the trial court commented that

> [t]he aggravating circumstances of your extensive juvenile and adult criminal record, the miserably failed efforts at probation, the fact that you were on probation at the time and taking a substance to curb your alcohol consumption, which failed miserably, the treatment failed miserably. It all failed awfully.

Sent. Tr. p. 71. As a result, the trial court sentenced Silvers to twenty years on the operating charge and to one year on the failure to stop after the accident count. As set forth in the plea agreement, the sentences were ordered to run consecutively to each other. Silvers now appeals.

DISCUSSION AND DECISION

I. Twenty-Year Sentence—Operating Charge

Silvers contends that the trial court erred in imposing a twenty-year sentence on the operating charge. Specifically, Silvers maintains that because the statutory range for a class B felony is between six and twenty years, the trial court could not sentence him to more than nineteen years.

In resolving this issue, we note that Indiana Code section 35-50-2-5 provides that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years. In addition, the

person may be fined not more than ten thousand dollars ($10,000)."

In our view, Silvers's contention that the trial court exceeded its authority and "imposed a sentence that does not conform to the mandate of the statute," appellant's br. p. 6, is misplaced. Our courts have never interpreted the high and low ends of sentencing ranges to exclude the numbers set forth in the statute. See Reyes v. State, 848 N.E.2d 1082-83 (Ind. 2005) (when defendant's plea called for a sentence ranging between ten and twenty years, he was subjecting himself to the maximum sentence of twenty years for a class B felony). Moreover, the legislature has never indicated that such a longstanding interpretation of the sentencing statutes by our courts is incorrect. For these reasons, Silvers's claim fails.

II. Consecutive and Enhanced Sentences

In a related issue, Silvers argues that even if a twenty-year sentence on the operating charge was proper, the trial court was without authority to impose enhanced sentences and also order them to be served consecutively to one another. In particular, Silvers argues that Indiana's new sentencing scheme prohibited the trial court from imposing enhanced and consecutive sentences on the offenses. Put another way, Silvers maintains "when sentences are run consecutively, the advisory sentence must be utilized."[4] Appellant's Br. p. 4.

In resolving this issue, we note that Indiana Code section 35-50-2-1.3(c) provides, in relevant part, as follows:

> In imposing consecutive sentences in accordance with I.C. 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a

[4] As noted above, the advisory sentence for a class B felony is ten years, with a minimum of six and a maximum of twenty years. I. C. § 35-50-2-5.

> consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Silvers's argument highlights a split of authority on our court. In analyzing the amended sentencing statutes, different panels of this court have reached different conclusions regarding the interaction between Indiana Code sections 35-50-1-2(c) and -1.3(c). In White v. State, we found that trial courts are authorized to impose enhanced, consecutive sentences:

> Indiana Code § 35-50-2-1.3 instructs: "In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]" We conclude that when the General Assembly wrote "appropriate advisory sentence," it was referring to the total penalty for "an episode of criminal conduct," which, except for crimes of violence, is not to exceed "the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the "appropriate advisory sentence" for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied.

In Robertson v. State, a separate panel rejected the White analysis and, instead, held that "the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively." 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted. The Robertson court expressed concern about the result in White:

> Our concern with the analysis in White is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, IC 35-50-2-1.3, limits its application to non-violent offenses. Although the White decision argues that the legislature could not have intended the results the statute is capable of generating, the argument is moot "[w]hen the language of the statute is clear and unambiguous." 849 N.E.2d at 742-43.

Id. at 624-25 (citation omitted).[5] Ultimately, the Robertson court remanded the case to the trial court with instructions that it reduce the enhanced, consecutive sentence to the advisory sentence.

A different panel of our court denounced the Robertson analysis and, instead, applied the White analysis. Barber v. State, 863 N.E.2d 1199, 1210 (Ind. Ct. App. 2007). Specifically, the Barber court found that the amended sentencing statutes do not limit a trial court's authority to impose enhanced, consecutive sentences:

> Indiana Code § 35-50-2-1.3 serves another very important purpose. In the wake of Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), our legislature transformed Indiana's sentencing scheme from a presumptive scheme to an advisory scheme. Under the former presumptive scheme, a trial court was required to impose the "presumptive" sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. Under the new advisory scheme, trial courts are generally not required to use an advisory sentence. See I.C. § 35-50-2-1.3 ("Except as provided in subsection (c), a court is not required to use an advisory sentence."). Because an advisory sentence is in most cases exactly that—advisory—the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana's trial courts of those statutory provisions that do require the "use" of an advisory sentence[, in relevant part,] in imposing consecutive sentences in accordance with Indiana Code § 35-

[5] We cite to Robertson for the purpose of demonstrating the various interpretations of the statutes.

> 50-1-2 . . . . We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana Code §§ 35-50-1-2, 35- 50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences.

Id. at 1211 (emphasis in original).

Even more recently in Geiger v. State, 866 N.E.2d 830, 840 (Ind. Ct. App. 2007), yet another panel declared: "we are persuaded that the better analysis is that set forth in White and Barber." In particular, we observed that

> When we read Indiana Code section 35-50-2-1.3 in conjunction with section 35-50-1-2, it is apparent that the reference to the "appropriate advisory sentence" was meant to apply to situations involving the single episode of criminal conduct limitation on consecutive sentencing. This statute was not intended to place any other limits on a court's ability to impose consecutive sentences. Contrary to the conclusion of the Robertson court, we do not believe that this interpretation renders the statutory language to be surplusage; rather, it provides clarification regarding what advisory sentence is to be used when the single episode of criminal conduct limitation is applicable. We also note that a troubling consequence of the Robertson analysis would be that trial courts would be prohibited from imposing enhanced, consecutive sentences on the worst offenders. That cannot have been the intent of our legislature. Consequently, we find that the trial court herein had the authority to impose enhanced, consecutive sentences, and did not err by doing so.

Id. at 840-41. For these same reasons, we find that the trial court herein properly exercised its discretion in imposing enhanced, consecutive sentences on Silvers.[6]

III. Appropriateness

Finally, Silvers argues that his sentence is inappropriate when considering the nature

[6] As an aside, we note that our legislature recently amended Indiana Code section 35-50-2-1.3, effective July 1, 2007. Specifically, subsection (d) was added to the statute, which now provides that "this section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct."

of the offenses and his character. Specifically, Silvers contends that his sentence should be revised because his addiction problem was "difficult to control" and the circumstances of the accident were unique because "it may not have occurred if the victim was not also driving illegally." Appellant's Br. p. 10. Thus, Silvers maintains that his sentence should be revised to ten years.

Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Indiana Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offenses, the only arguments that Silvers advances in support of his position are that he "did not kill anyone" and that "the person killed was exercising a similar lack of care as the Defendant." Appellant's Br. p. 9. However, even though the prosecutor commented that Scherer might have been driving illegally when the accident occurred, Silvers's arguments with regard to the nature of the offense are of no moment.

For instance, the evidence shows that on June 7, 2006, Silvers stated to his probation officer that he "can't wait to get off [probation] so [he could] drink again." Sent. Tr. p. 19-

20. Two days later, Silvers took Antabuse, an alcohol deterrent medication. However, on June 11, the night of the fatal accident, Silvers took his sister's vehicle without permission and drank alcohol at a party until his blood-alcohol content reached a level of .19. Id. at 12, 23, 54. Indeed, Silvers "was so intoxicated that he didn't remember getting in the vehicle and driving it." Id. at 14. Silvers either "drank through the medication" after vomiting relieved its symptoms, or he hid the Antabuse pill in his mouth without swallowing it. Id. at 23; Appellant's App. p. 69.

It is readily apparent that Silvers's resolve to drink was unshakable and he completely ignored the consequences of his conduct. Moreover, Silvers fled the scene without calling for aid or inquiring about the victim's condition. In sum, Silvers's arguments that his sentence should be revised when considering the nature of the offenses are unavailing.

Turning to his character, the record reveals that Silvers has had almost uninterrupted contact with the criminal justice system beginning in 1999. Appellant's App. p. 66-67. In particular, Silvers accumulated seven juvenile delinquency adjudications, two of which were burglaries that would have been felonies if committed as an adult and three of which were alcohol related. Id. at 66. Moreover, Silvers's juvenile probation was revoked after five reported violations. Id. As an adult, Silvers has accumulated three misdemeanor convictions and two felony convictions. Id. at 66-67. Four of the offenses were alcohol related, and two of them involved the crime of driving while intoxicated. Id. Silvers also tested positive for marijuana twice while on probation but his probation was not revoked. Id. at 69; Sent. Tr. p. 27. Additionally, Silvers was on probation for an alcohol-related offense when these crimes

were committed. As the trial court observed, efforts to rehabilitate Silvers have failed and "the system has nothing else" to offer him. Tr. p. 70.

In conclusion, the record shows that Silvers has a lengthy criminal history, and the offenses that he committed in this case appear to have been motivated or prompted in no small measure by his drug and/or alcohol abuse. Despite repeated run-ins with the law, Silvers has not been deterred from criminal conduct, and he has continued to disregard the law. After analyzing the nature of the offenses and Silvers's character, we do not find the sentence inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.